No. 85-1409 (4)

# In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

JANET J. YUCKERT

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether the court of appeals erroneously invalidated a regulation promulgated by the Secretary of Health and Human Services, 20 C.F.R. 404.1520(c), which provides that a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 774 F.2d 1365. The order of the district court (Pet. App. 14a) and the recommendation of the magistrate (Pet. App. 15a-19a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985 (Pet. App. 13a). By order dated January 14, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 21, 1986. The petition was filed on that date and was granted on May 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 223(d)(1)(A), (2)(A) and (C) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A), (2)(A) and (C); Section 1614(a)(3)(A), (B) and (G) of the Social Security Act, as codified at 42

U.S.C. (& Supp. II) 1382c(a)(3)(A), (B) and (G); and 20 C.F.R. 404.1520, 404.1521, 416.920, 416.921, are reproduced at App., *infra*, 1a-7a.

## STATEMENT

The court of appeals in this case invalidated a regulation that is an integral part of the sequential evaluation process established by the Secretary of Health and Human Services for determining whether a person seeking Social Security disability benefits is disabled. The regulation provides that if the claimant does not have a medically "severe" impairment—defined to mean an impairment that significantly limits his mental or physical ability to do the basic work activities that are necessary for most jobs—the claimant will be found not to be disabled.

### A. THE STATUTORY AND REGULATORY FRAMEWORK

Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability." 42 U.S.C. (Supp. II) 423(a)(1)(D). Disability benefits also are provided under the Supplemental Security Income (SSI) program established by Title XVI of the Act. 42 U.S.C. (& Supp. II) 1382(a). The term "disability" is defined to mean

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *[.]

42 U.S.C. 423(d)(1)(A); see also 42 U.S.C. 1382c(a)(3)(A). The Act further provides in relevant part that an individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.



42 U.S.C. (Supp. II) 423(d)(2)(A); 42 U.S.C. 1382c(a)(3)(B).

To implement these statutory definitions, the Secretary by regulation has established a five-step "sequential evaluation" process to be followed by the decision-maker (the state agency, the administrative law judge (ALJ), or the Appeals Council) in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. See *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 2-3; *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983). At step 1 of that process, the decision-maker determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is not disabled. 20 C.F.R. 404.1520(b), 416.920(b).

If the claimant is not engaged in substantial gainful activity, the sequential evaluation process continues to step 2, which is at issue in this case. At step 2, the decision-maker determines whether the individual has demonstrated the existence of a medically "severe" impairment or combination of impairments. 20 C.F.R. 404.1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1521(a), 416.921(a)), which are defined to mean "the abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b), 416.921(b)). The regulations identify examples of such abilities and aptitudes: (1) "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; (2) "[c]apacities for

seeing, hearing, and speaking"; (3) "[u]nderstanding, carrying out, and remembering simple instructions"; (4) "[u]se of judgment"; (5) "[r]esponding appropriately to supervision, co-workers and usual work situations"; and (6) "[d]ealing with changes in a routine work setting" (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant does not have an impairment that significantly limits his ability to do such basic work activities, he will be found not to be disabled at step 2, without consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).[1]

If the claimant is found to have a "severe" impairment, the decision-maker then must determine at step 3 of the sequential evaluation process whether the impairment is so serious as to meet or equal the listed impairments that are deemed by the Secretary to be of sufficient severity to preclude substantial gainful activity, without the need to consider the claimant's age, education, and work experience. 20 C.F.R. 404.1520(d), 416.920(d); 20 C.F.R. Pt. 404, Subpt. P, App. 1. If the individual's impairment is not one that is "conclusively presumed" to be disabling under these listings (see *Bowen* v. *City of New York,* slip op. 2), the decision-maker then must determine at step 4 whether the impairment prevents the individual from per-

[1] The sequence in which the severity of the impairment is considered is somewhat different under the recently promulgated regulations governing the evaluation of claimants who already are receiving disability benefits. See 50 Fed. Reg. 50135-50136, 50142-50143 (Dec. 6, 1985), adding 20 C.F.R. 404.1594(f) and 416.994(b)(5). This different sequence was adopted in order to take account of the new "medical improvement" standard enacted in Section 2 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794-1799, 42 U.S.C. (Supp. II) 423(f), 1382c(a)(5). See *Bowen* v. *City of New York,* slip op. 18 n.14; note 11, *infra*. This case involves a new applicant for benefits, not a current recipient, and it therefore is governed by the regulations discussed in the text.



forming his own past work. If the claimant can do his past work, he is found not to be disabled. 20 C.F.R. 404.1520(e), 416.920(e). But if the claimant cannot do his past work, the decision-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he nevertheless is able to perform other work that exists in the national economy. At this final step, the Secretary ordinarily applies the medical-vocational guidelines that were sustained by this Court in *Heckler* v. *Campbell, supra.*

**B. THE PROCEEDINGS IN THIS CASE**

1. Respondent applied for Social Security disability benefits and SSI benefits in October 1980 (R. 82, 86).[2] She alleged that she was disabled on the basis of labyrinthine (inner ear) dysfunction with occasional episodes of dizziness; loss of visual focus; and flat feet (Pet. App. 15a, 26a; R. 82). After her claim was denied at the initial determination and reconsideration stages (J.A. 19-26; R. 90-96, 98), respondent requested a hearing before an ALJ.

The record before the ALJ showed that respondent was 45 years old and had a high school education, two years of business college, and real estate training (Pet. App. 26a). From 1963 to 1977, she had been employed as a travel agent (*id.* at 15a, 26a). From September 1978 through September 1979, with interruptions due to illness, respondent worked in real estate sales (*id.* at 15a); she testified that "the market kind of just fell because of the high interest rate and so I left that job in September of 1979" (R. 52).

Following the hearing (R. 34-81), the ALJ concluded that respondent's impairments were not severe within the meaning of 20 C.F.R. 404.1520(c) and 416.920(c) and denied her claim (Pet. App. 24a-27a). The ALJ found that

[2] "R." refers to the transcript of the administrative record that was certified to the district court pursuant to 42 U.S.C. 405(g).

although respondent was not "free from episodes of dizziness or vision problems," she was "exaggerating the effects of her impairments" and, in particular, "appear[ed] to be overemphasizing the effect of her impairments on her ability to perform basic functions" (*id.* at 28a). The ALJ found in this regard that "[m]ultiple tests given [to respondent] failed to divulge objective clinical findings of abnormalities that support [the alleged] severity of the stated impairments" (*id.* at 27a), observing that respondent was successfully pursuing a "relatively difficult" two-year community college training plan for computer programming (*id.* at 27a-28a). In the ALJ's view, respondent's success in computer training, "coupled with generally negative clinical findings" and her ability to perform various activities, such as driving her car 80 to 90 miles per week, demonstrated that her vision and balance problems "[did] not significantly limit her ability to perform basic work-related functions, e.g., real estate salesperson" (*id.* at 28a).[3]

The Appeals Council denied respondent's request for review (Pet. App. 21a-22a), explaining that additional psychological testing data submitted to the Appeals Council by respondent's representative did not undermine the ALJ's decision (*id.* at 22a):

> The over-all results of all the testing indicated an average range of intellectual abilities, with no pro-

[3] The ALJ noted that a vocational expert called by respondent had testified that respondent's medical condition would preclude her from working competitively, but the ALJ found that "the objective clinical diagnostic findings of record do not support the conclusion that [respondent] is 'disabled' " (Pet. App. 27a). The ALJ explained that "[s]ymptoms alone do not establish there is a physical or mental impairment" and that "[m]edical signs [or] findings should be accompanied by a medical condition that could reasonably be expected to produce the symptoms" (*ibid.*). See 42 U.S.C. (Supp. II) 423(d)(5), 1382c(a)(3)(H); 20 C.F.R. 404.1529. See note 11, *infra*.



> found irregularities and the majority of skills still fully intact. Only the finger dexterity test administered showed a degree of difficulty. The Appeals Council notes in that regard that the limitations potentially imposed by the difficulty you might experience in small detailed parts dexterity does not indicate an inability to perform any substantial gainful activity. The weight of the entire evidence of record in your case, including the new evidence, supports the administrative law judge's finding that you do not have any significant impairment of work-related abilities.

2. Respondent then sought judicial review in the United States District Court for the Western District of Washington pursuant to 42 U.S.C. 405(g). The case was referred to a magistrate, who recommended that the district court affirm the Secretary's decision that respondent had not established that she had a severe impairment (Pet. App. 15a-19a). The magistrate noted the testimony by a vocational expert and a statement by a physician that respondent's impairments were incapacitating (*id.* at 18a). On the other hand, the magistrate found that respondent's success in the community college program "is substantial evidence of her ability to perform basic work activities" (*id.* at 17a-18a). In the magistrate's view, this determination was "reinforced" by the opinion of respondent's counselor at the state Department of Vocational Rehabilitation that respondent would have little problem in obtaining employment when she completed her training (*id.* at 18a). Although the evidence thus was conflicting regarding the severity of respondent's impairments, the magistrate concluded: "It is the function of the Secretary, * * * not of this court, to weigh that evidence and to resolve the issue. Because there is substantial evidence in support of the Secretary's conclusion, this court is required to affirm her determination" (*id.* at 19a). The dis-

trict court adopted the magistrate's report and affirmed the Secretary's decision denying respondent's claim (*id.* at 14a, 20a).

3. The court of appeals reversed and remanded (Pet. App. 1a-12a). The court of appeals did not reach the question whether there was substantial evidence to support the Secretary's decision that respondent did not have a severe impairment that significantly limited her ability to do basic work activities. Instead, the court held that the regulation that permits the Secretary to deny benefits at step 2 of the sequential evaluation process because of the absence of a severe impairment is invalid.[4] The court therefore directed that the case be remanded to the Secretary to be reconsidered without reliance on the severity regulation.

a. The court of appeals recognized that under 42 U.S.C. 405(a), "Congress has delegated to the Secretary broad power 'to prescribe standards for applying certain sections of the [Social Security] Act' " (Pet. App. 8a, quoting *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 43 (1981)). The court further recognized that the severity regulation must be sustained unless it exceeds the Secretary's statutory authority or is arbitrary and capricious (Pet. App. 8a, citing *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983)). However, the court held that the severity regulation violates the Social Security Act because, in the court's view, "it does not permit the individualized assessment of disability required by the Act" (Pet. App. 8a). The court gave three reasons for its conclusion.

First, the court believed that the regulation is inconsistent with 42 U.S.C. 423(d)(2)(A), which provides that a

[4] The court of appeals acknowledged that respondent had not challenged the severity regulation in district court, but the court nevertheless chose to consider the issue because it "is purely one of law" and "a significant question of general impact" (Pet. App. 4a-5a). Although respondent applied for disability benefits under the SSI program as well as Title II (see page 5, *supra*), respondent's complaint in district court referred only to Title II and the court of appeals discussed only the severity regulation under Title II (Pet. App. 2a, 6a-7a, 11a-12a).



claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *." The court interpreted this provision to require the Secretary specifically "to consider factors such as [the claimant's] age, education, work experience, and ability to do past work" in *every* disability determination, irrespective of whether the claimant has demonstrated that his impairment satisfies a threshold level of severity (Pet. App. 5a, 9a).

Second, the court "reject[ed] the Secretary's contention that the legislative history of the Act, particularly the [Social Security Disability Benefits Reform Act of 1984], supports the sequential evaluation process" (Pet. App. 9a). The court acknowledged that Congress considered the severity regulation when it enacted the 1984 Act and had failed to eliminate the established requirement that the claimant demonstrate a severe impairment. However, relying on the fact that the House Report had "urge[d]" the Secretary to revise the severity criteria in order " 'to reflect the real impact of impairments upon the ability to work' " (*id.* at 10a, quoting H.R. Rep. 98-618, 98th Cong., 2d Sess. 8 (1984)), the court believed that the legislative history of the 1984 Act did not suggest a congressional intent to permit a finding of non-disability to be based on medical evidence alone (Pet. App. 10a).

Third, the court held that the regulation is contrary to judicial decisions that it construed to require that "disability determinations be made according to a two-step process, with the claimant first showing an inability to perform [his] past relevant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work" (Pet. App. 10a). Because the court believed that "the severity regulation ignores vocational

factors where a claimant's impairment is found nonsevere," it held that the regulation "conflicts with this precedent and thus improperly denies benefits to a claimant who has made a prima facie showing of disability" (*id.* at 10a-11a).

b. The court of appeals acknowledged, albeit only in a footnote (Pet. App. 9a n.6), that the Secretary had adopted a new Social Security Ruling, SSR 85-28, for the purpose of clarifying the application of the severity standard at step 2 of the sequential evaluation process. See Pet. App. 37a-44a. SSR 85-28 reflects both the Secretary's ongoing reevaluation of step 2 (see pages 47-48 & note 29, *infra*) and the Secretary's response to concerns expressed by several courts of appeals that the regulation might be too strictly applied. The Secretary explained in SSR 85-28 that the current severity regulation, which was promulgated in 1978[5] and revised somewhat in 1980,[6] was not intended to alter the threshold level of impairment severity that had been applied prior to 1978. Under the pre-1978 standard, a claimant could be found not to be disabled on medical evidence alone (*i.e.*, without specific consideration of his age, education, and work experience) if his impairment was "a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities." 20 C.F.R. 404.1502(a) (1977). Accordingly, the Secretary emphasized in SSR 85-28 that benefits are to be denied at step 2 of the current sequential evaluation regulations only when an individual's impairments "would have no more than a minimal effect on [his] ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a).

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[5] 43 Fed. Reg. 55363, 55371 (1978), adding 20 C.F.R. 404.1503(c), 404.1504(a)(1), 416.903(c), 416.904(a)(1).

[6] 45 Fed. Reg. 55588, 55624-55625 (1980), adding 20 C.F.R. 404.1520 (c), 404.1521, 416.920(c), 416.921.



The court of appeals recognized that SSR 85-28 interprets the severity regulation in the same manner as that approved by five other circuit courts (Pet. App. 8a-9a n.6).[7] However, the court expressed no view on the validity of SSR 85-28 because it had not then been formally published[8] and because the court in any event concluded that "the regulation it interprets is inconsistent with the Social Security Act" (*ibid.*).

## SUMMARY OF ARGUMENT

The severity regulation at issue in this case is applied at step 2 of the five-step sequential process for the evaluation of disability claims. It is a screening mechanism that implements the congressional intent that Social Security disability benefits are to be paid only to those individuals whose impairments are sufficiently serious that they may properly be regarded as a substantial cause of their alleged inability to work. The Secretary is authorized by 42 U.S.C. 405(a) to adopt such regulations for the purposes of prescribing the procedures and evidentiary showings required in the adjudication of disability claims and of giving content to the statutory standards of eligibility. Contrary to the court of appeals' view, the particular regula-

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[7] Citing *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (6th Cir. 1985); *Estran* v. *Heckler*, 745 F.2d 340, 341 (5th Cir. 1984); *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady* v. *Heckler*, 724 F.2d 914, 920 (11th Cir. 1984). The fifth appellate decision cited by the court below was that of the Second Circuit in *Chico* v. *Schweiker*, 710 F.2d 947, 954-955 & n.10 (1983). However, since the date of the Ninth Circuit's opinion in this case, the Second Circuit in another case has affirmed a preliminary injunction barring the use of the severity regulation. See *Dixon* v. *Heckler*, 785 F.2d 1102 (1986), petition for cert. pending, No. 86-2, discussed at note 9, *infra*.

[8] SSR 85-28 was published in November 1985 as part of the October 1985 quarterly Social Security Rulings.

tion at issue here is fully supported by the text, legislative history, and consistent administrative implementation of the Social Security Act.

A.

The basic statutory definition of the term "disability," set forth in 42 U.S.C. 423(d)(1)(A), is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The severity regulation gives content to and is fully consistent with that definition. Although the regulation requires that the claimant's impairment must satisfy a certain threshold level of severity based on medical evidence alone, that level of severity is measured essentially in vocational terms: the effect of the impairment on the claimant's mental and physical capacity to work. Thus, the regulation provides that a person is not disabled if he does not have an impairment (or combination of impairments) that "significantly limits" his ability to do "basic work activities" (20 C.F.R. 404.1520(c)), which are the "abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b)). If the claimant has not shown that his impairment significantly limits his ability to do such "basic work activities," then his impairment plainly does not render him unable to perform "any substantial gainful activity" within the meaning of the statutory definition of "disability" in 42 U.S.C. 423(d)(1)(A).

Moreover, a number of provisions of the Act make clear that the claimant must demonstrate on the basis of medical evidence that he has a physical or mental impairment to which his alleged inability to work may properly be attributed. Section 423(d)(1)(A) itself requires that the impairment ~~by~~ be "medically determinable" and that the inability to work be "by reason of" such an impairment. In addition, the term "physical or mental impairment" is defined to mean one that is "demonstrable by medically



acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3). As this Court has recognized, the claimant bears the burden of making such a medical showing (*Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976)), and that burden is confirmed by 42 U.S.C. (Supp. II) 423(d)(5)(A), which provides that "[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

The court of appeals did not discuss these statutory provisions that support the severity regulation. Instead, it found the regulation to be inconsistent with 42 U.S.C. (Supp. II) 423(d)(2)(A), which provides that an individual shall be determined to be under a disability "only if" his impairment is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." The court of appeals believed that the reference in this provision to the claimant's "age, education, and work experience" requires a consideration of these factors in every disability determination and that benefits therefore cannot be denied on the basis of medical evidence alone. Contrary to that court's view, however, Section 423(d)(2)(A) by its terms states further conditions of eligibility that must be satisfied before an application for benefits may be *granted*. It does not impose any additional conditions that must be satisfied in order for an application to be *denied*, where the Secretary has determined that the claimant has failed to satisfy the requirements of the basic definition of the term "disability" in Section 423(d)(1)(A) and implementing regulations—including, as here, the threshold requirement that the claimant's impairment be severe. Moreover, as the interpretative guidance in SSR 85-28 makes clear, the severity regulation is consistent with Section 423(d)(2)(A) even if that provision does

impose additional limitations on the denial of an application. In SSR 85-28, the Secretary explained that an impairment is found to be "not severe" only when the medical evidence establishes that the impairment "would have no more than a minimal effect on [the] individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a).

In any event, the validity of the severity regulation is expressly confirmed by 42 U.S.C. (Supp. II) 423(d)(2)(C), which was added by the Social Security Disability Benefits Reform Act of 1984. This new provision requires that the combined effect of all of the individual's impairments be considered in determining whether his condition is of "sufficient medical severity" that it could be the basis of eligibility, and further provides that if the Secretary does find a "medically severe" combination of impairments, the effect of those impairments shall be considered "throughout the disability determination process." The quoted phrases plainly contemplate the continued use of the severity step of the sequential evaluation process.

**B.**

The validity of the severity step of the sequential evaluation process is further confirmed by the legislative history of the relevant provisions of the Social Security Act and by the administration of the disability program since its inception in 1954. As an initial matter, the Senate and House reports on the Social Security Amendments of 1954 stress that the claimant must be "totally disabled"; that he must have both a medically determinable impairment of "serious proportions" and an inability to work "by reason of such impairment"; and that the impairment must be of a "degree of severity" to justify its consideration as the cause of his failure to obtain substantial gainful work. H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954). This expression of



congressional intent firmly supports the requirement that a claimant's impairment satisfy a threshold level of severity. Moreover, the Secretary made clear in instructions issued to the state agencies immediately after the 1954 amendments were enacted that a person could be found on medical evidence alone not to be disabled, and this administrative interpretation was carried forward in formal regulations promulgated in 1960. This contemporaneous implementation of the Act is entitled to great weight.

When Congress enacted 42 U.S.C. 423(d)(2)(A) in the 1967 amendments to the Social Security Act, it did not overrule or express disapproval of this position reflected in published regulations since 1960. To the contrary, in language that is a virtual blueprint for the sequential evaluation process now in effect, the committee reports on the 1967 amendments describe three distinct showings the claimant must make, the first of which is that "he has a severe medically determinable physical or mental impairment or impairments" (S. Rep. 744, 90th Cong., 1st Sess. 48-49 (1967); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967)). After the 1967 amendments were enacted, the Secretary revised the disability regulations to take account of those amendments, and he retained the provision in the 1960 regulations that permitted benefits to be denied on medical grounds alone. This retention reflects a contemporaneous and manifestly reasonable understanding by the Secretary that Congress did not intend in 1967 to overturn the Secretary's formal and longstanding administrative interpretation.

The severity regulation at issue in this case, which was promulgated in 1978 as part of the formal sequential evaluation process, carries forward this prior administrative interpretation and practice under the disability program. Congress again declined to disturb this regulation and the statutory interpretation it embodies when it amended the disability provisions in 1980 and 1982, and

the legislative history of the 1980 amendments in fact reiterates the intent of the 1967 amendments that the claimant must demonstrate that he has a "severe medically determinable" impairment.

Any remaining doubt regarding the validity of the severity regulation is dispelled by the Social Security Disability Benefits Reform Act of 1984. As we have said, amendments made by that Act expressly refer to the determination of whether the claimant's impairment is "medically severe." But in addition, the committee reports and floor debates make clear that Congress fully understood that a claim can be denied as "non-severe" at step 2 of the sequential evaluation process on the basis of medical evidence alone, without consideration of the claimant's age, education, and work experience; and the House, Senate, and Conference reports all expressly state that no departure from that process was intended (except to the extent of requiring consideration of the combined effect of multiple impairments). That unambiguous ratification of the severity regulation is controlling here.

## ARGUMENT

### THE SEVERITY REGULATION CONSTITUTES A VALID EXERCISE OF THE SECRETARY'S AUTHORITY UNDER 42 U.S.C. 405(a) TO ISSUE RULES REGULATING THE RECEIPT OF EVIDENCE AND MANNER OF PROOF IN DISABILITY CASES AND TO GIVE CONTENT TO THE STATUTORY DEFINITION IN 42 U.S.C. 423(d)(1)(A) OF THE TERM "DISABILITY"

The severity regulation invalidated by the court of appeals in this case is an integral part of the five-step sequential evaluation process established by the Secretary of Health and Human Services to facilitate the fair, efficient, and uniform adjudication of the more than two million claims for disability benefits that are filed each year under the Social Security Act. The principle reflected in the regulation—that in appropriate circumstances a person



may be denied disability benefits on the basis of medical evidence alone—has been a feature of the disability program since its inception in 1954, and that principle has been endorsed by Congress on a number of occasions since that time. The requirement that the claimant make a showing on the basis of medical evidence that his impairment meets a specified threshold level of severity serves to ensure that disability benefits are paid only where the claimant's physical or mental impairment is found to be a substantial cause of his inability to work, and thereby to distinguish the Social Security disability program from unemployment compensation and similar systems that are not primarily premised on medical incapacity.

The severity regulation also serves an important screening function in the processing of scores of thousands of applications each month. The regulation makes it unnecessary for the decision-maker to engage in an individualized vocational evaluation where a medical assessment establishes that the claimant's impairment is sufficiently insubstantial that it reasonably could be expected not to preclude all substantial gainful activity, irrespective of the claimant's age, education, and work experience. "The need for efficiency is self-evident." *Heckler* v. *Campbell,* 461 U.S. at 461 n.2. In accordance with this premise, a number of courts of appeals have held that the severity regulation constitutes a valid administrative implementation of the statutory standard of disability. *McDonald* v. *Secretary of Health & Human Services,* No. 86-1288 (1st Cir. July 17, 1986), slip op. 10-20; *Hampton* v. *Bowen,* 785 F.2d 1308, 1311 (5th Cir. 1986); *Garza* v. *Heckler,* 771 F.2d 871, 873 (5th Cir. 1985); *Stone* v. *Heckler,* 752 F.2d 1099, 1101-1103 (5th Cir. 1985); *Farmer* v. *Secretary of Health & Human Services,* No. 85-5619 (6th Cir. July 11, 1986); *Salmi* v. *Secretary of Health & Human Services,* 774 F.2d 685, 691-692 (6th Cir. 1985); *Farris* v. *Secretary of Health & Human Services,* 773 F.2d 85, 89-90 (6th Cir.

1985); *Flynn* v. *Heckler,* 768 F.2d 1273, 1274-1275 (11th Cir. 1985); *Brady* v. *Heckler,* 724 F.2d 914, 918-920 (11th Cir. 1984); but cf. *McCruter* v. *Bowen,* 791 F.2d 1544 (11th Cir. 1986).[9]

These decisions of the various courts of appeals that have sustained the severity regulation are clearly correct. *Heckler* v. *Campbell,* 461 U.S. 458 (1983), establishes the

[9] The Fourth Circuit also has sustained decisions of the Secretary denying benefits based on a finding that the claimant's impairment was not severe, albeit without addressing the validity of the severity regulation. See *Gross* v. *Heckler,* 785 F.2d 1163 (1986); *Evans* v. *Heckler,* 734 F.2d 1012, 1014 (1984).

By contrast, in addition to the Ninth Circuit in this case, the Third, Eighth, and Tenth Circuits have invalidated the severity regulation on its face, rejecting the contention that it constitutes a reasonable measure for screening out claimants with relatively minor impairments. See *Wilson* v. *Secretary of Health & Human Services,* No. 85-5814 (3d Cir. July 14, 1986), slip op. 9-12; *Brown* v. *Heckler,* 786 F.2d 870, 871-872 (8th Cir. 1986); *Hansen* v. *Heckler,* 783 F.2d 170, 174-176 (10th Cir. 1986). The Seventh Circuit, in an Illinois-wide class action, also has invalidated the regulation as applied to certain categories of claimants. *Johnson* v. *Heckler,* 769 F.2d 1202, 1209-1213, reh'g en banc denied by an equally divided court, 776 F.2d 166 (1985), petition for cert. pending, No. 85-1442. Compare *Bunch* v. *Heckler,* 778 F.2d 396, 398-400 & n.4 (7th Cir. 1985). The Second Circuit, in a New York-wide class action, recently affirmed a preliminary injunction barring the application of the severity regulation, although the court purported not to finally resolve the question of the validity of the regulation because it reviewed the preliminary injunction under an abuse-of-discretion standard. *Dixon* v. *Heckler,* 785 F.2d 1102, 1106-1107 (1986), petition for cert. pending, No. 86-2. Application of the severity regulation also has been barred by a preliminary injunction entered almost two years ago in a Ninth Circuit-wide class action. *Smith* v. *Heckler,* 595 F. Supp. 1173 (E.D. Cal. 1984), appeal pending, No. 85-2178 (9th Cir.). Similar injunctive orders have been entered in other class actions. See *Wilson* v. *Secretary of Health & Human Services, supra; Campbell* v. *Heckler,* 620 F. Supp. 469 (N.D. Iowa 1985), appeal pending, No. 86-1090NI (8th Cir.); *Bailey* v. *Bowen,* No. 83-1797 (M.D. Pa. Mar. 11, 1986), appeal pending, No. 86-5038 (3d Cir.); *Mason* v. *Bowen,* No. 83-390 (D. Vt. May 21, 1986); *Pratt* v. *Heckler,* 629 F. Supp. 1496 (D.D.C. 1986).



governing framework for evaluating the validity of regulations promulgated by the Secretary to regulate the manner of proof in disability cases and to give content to the statutory definition of the term "disability." In *Heckler* v. *Campbell,* the Court considered the validity of the medical-vocational guidelines that are applied at step 5 of the sequential evaluation process. The Court observed that 42 U.S.C. 405(a) directs the Secretary to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. See 461 U.S. at 466. In the Court's view, Congress, through this directive, has " 'conferred on the Secretary exceptionally broad authority to prescribe standards' " for applying the statutory definition of the term "disability." *Ibid.,* quoting *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 43 (1981). "Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation," a court's review "is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." 461 U.S. at 466. The severity regulation plainly suffers from neither defect. To the contrary, the text of the Act and the legislative and administrative history of the relevant statutory and regulatory provisions lend overwhelming support to the regulation—far more so even than was the case with the medical-vocational guidelines that were unanimously sustained in *Heckler* v. *Campbell.*

**A. THE VALIDITY OF THE SEVERITY REGULATION IS SUPPORTED BY THE STATUTORY DEFINITION OF THE TERM "DISABILITY" IN 42 U.S.C. 423(d)(1)(A), AS WELL AS OTHER PROVISIONS OF THE ACT, AND IS EXPRESSLY SANCTIONED BY THE SOCIAL SECURITY DISABILITY BENEFITS REFORM ACT OF 1984**

The severity step of the sequential evaluation process is affirmatively supported by the text of a number of the

provisions of the Social Security Act that govern the disability program. The court of appeals failed to discuss those provisions, much less to consider their cumulative effect.

1. In the first place, the severity regulation employed at step 2 of the sequential evaluation process is directly tied to and faithfully implements the basic statutory definition of the term "disability" that applies in the Social Security disability program. That definition, which was enacted in the Social Security Amendments of 1954 (ch. 1206, § 106(d), 68 Stat. 1080), provides that the term "disability" shall mean—

> [the] inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. 423(d)(1)(A).[10] The corresponding definition under the SSI program is identical. See 42 U.S.C. 1382c(a)(3)(A). Nothing in this generally worded definition casts any doubt on the validity of the severity regulation.

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[10] In the 1954 amendments, Congress provided for the preservation of the right to old age and survivor's insurance during a period of extended disability—the so-called disability "freeze." Congress did not then provide for the payment of benefits to a person because of his disability. See H.R. Rep. 1698, 83d Cong., 2d Sess. 22-24 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 20-22 (1954). (Provisions for such a "freeze" previously were enacted on a contingent basis in Section 3(d) of the Social Security Amendments of 1952 (ch. 945, 66 Stat. 771), but those amendments did not take effect. See H.R. Conf. Rep. 2491, 82d Cong., 2d Sess. 9 (1952); 98 Cong. Rec. 9522 (1952) (remarks of Sen. Johnson); *id.* at 9661 (remarks of Rep. Reed).

The definition of the term "disability" enacted in the 1954 amendments is contained in 42 U.S.C. (& Supp. II) 416(i). That definition was carried forward verbatim in 42 U.S.C. 423(d)(1)(A), at issue here, when Congress enacted the Title II disability insurance benefits program in 1956. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. See note 20, *infra*.



The severity regulation informs the claimant:

> If you do not have an impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. 404.1520(c), 416.920(c). The term "basic work activities" is defined by regulation for these purposes to mean "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. 404.1521(b), 416.921(b). By way of amplification, the regulations include examples of such aptitudes and abilities: "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;" "[c]apacities for seeing, hearing, and speaking;" "[u]nderstanding, carrying out, and remembering simple instructions;" etc. 20 C.F.R. 404.1521(b), 416.921(b).

Although the regulations at issue here thus prescribe a threshold showing of severity that the claimant's impairment must satisfy based solely on the *medical* evidence of the claimant's condition (*i.e.*, without specific consideration of his age, education, and work experience), that severity is measured essentially in *vocational* terms—the impact that the impairment has on the claimant's ability to perform the "basic work activities" that are "necessary to do most jobs." The regulations therefore adhere and give content to the statutory definition: if the claimant has not shown that his impairment is so severe as to "significantly limit" his ability to perform the basic work functions necessary for most jobs, then he plainly has not

demonstrated, for purposes of the statutory definition, an "inability to engage in any substantial gainful activity by reason of [the] impairment" (42 U.S.C. 423(d)(1)(A)). See *Brown* v. *Heckler,* 786 F.2d at 873 (Bowman, J., concurring and dissenting). In other words, as the Secretary explained in the clarifying guidance contained in SSR 85-28 (discussed at page 10, *supra*), "[i]nherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA [substantial gainful activity] is not seriously affected" (Pet. App. 42a).

2. The court of appeals believed, however, that benefits cannot be denied in this manner on the basis of medical evidence alone and that the claimant's age, education, and work experience (which the court apparently regarded as the only "vocational" considerations) must be specifically considered in connection with every application for disability benefits. See Pet. App. 9a. This reasoning is seriously flawed for several reasons. In the first place, as we have just explained, the severity test at step 2 of the sequential evaluation process in fact does take vocationally related considerations into account, because the severity of an impairment must be measured in terms of its impact on the claimant's ability to perform basic work activities.

Furthermore, a number of provisions of the Act make clear that the claimant must demonstrate, on the basis of medical evidence, that he has a physical or mental impairment to which his alleged inability to work may properly be attributed. Only then has the claimant established the necessary predicate for the finding, required by 42 U.S.C. 423(d)(1)(A), that his alleged inability to engage in any substantial gainful activity is "by reason of" his impairment.

As an initial matter, Section 423(d)(1)(A) itself requires that the alleged impairment be "medically determinable." Moreover, 42 U.S.C. 423(d)(3) provides that for purposes



of the basic statutory definition of "disability," a "physical or mental impairment" is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." An applicant for disability benefits, such as respondent, bears the burden of establishing the existence of his impairment by such acceptable medical evidence. See *Mathews* v. *Eldridge,* 424 U.S. 319, 336 (1976). This burden is confirmed by 42 U.S.C. (Supp. II) 423(d)(5)(A), which provides that "[a]n individual shall not be considered to be under a disabiltiy unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." See *Eldridge,* 424 U.S. at 336. All of these provisions support the propriety of the Secretary's requirement that the claimant establish through medical evidence that his impairment meets a certain threshold level of severity.[11]

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[11] The importance attached to medical evidence of the impairment is underscored by the amendments to 42 U.S.C. 423(d)(5) that were made by Section 3(a)(1) of the Social Security Disability Benefits Reform Act of 1984 [1984 Act], Pub. L. No. 98-460, 98 Stat. 1799. Those amendments added the following to the sentence in 42 U.S.C. (Supp. II) 423(d)(5)(A) that is quoted in the text (emphasis added):

> An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be *medical signs and findings,* established by *medically acceptable* clinical or laboratory diagnostic techniques, which show the existence of a *medical impairment* that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph * * *, would lead to a conclusion that the individual is under a disability. Objective *medical evidence* of pain or other symptoms established by *medically acceptable* clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.

This amendment was intended to codify the existing administrative policy regarding the evaluation of pain (see 20 C.F.R. 404.1529),

3. The court of appeals did not discuss the authority for the severity regulation contained in the basic definition of "disability" in 42 U.S.C. 423(d)(1)(A) and the additional statutory provisions, just quoted, that pertain to the claimant's burden of producing medical evidence of his impairment. Instead, in its brief discussion of the statutory text, the court of appeals looked only to 42 U.S.C. (Supp. II) 423(d)(2)(A), which it believed rendered the severity regulation invalid on its face. Section 423(d)(2)(A), which was enacted in the Social Security Amendments of 1967 (Pub. L. No. 90-248, § 158(b), 81 Stat. 868), provides in relevant part:

> an individual * * * shall be determined to be under a disability only if his physical or mental impairment or

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pending completion of the study of methods for the evaluation of pain required by Section 3(b) of the 1984 Act (98 Stat. 1799-1800). See H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 28-29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 23-24 (1984). The statutory provision regarding the evaluation of pain is made applicable to the SSI program by 42 U.S.C. (Supp. II) 1382c(a)(3)(H).

The relevance to the instant case of this amendment regarding the evaluation of pain is confirmed by the Senate Report, which explained that the amendment is consistent with the "clear intent" of Congress "that benefits be provided only to those who have *severe medical conditions* which preclude their engaging in substantial gainful activity." S. Rep. 98-466, *supra*, at 23 (emphasis added). See also *id.* at 24 (emphasis added) ("There must be evidence of an underlying medical condition and (1) there must be objective *medical evidence* to confirm the *severity* of the alleged pain arising from that condition or (2) the objectively determined *medical condition must be of a severity* which can reasonably be expected to give rise to the alleged pain."). Accord, 130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984) (remarks of Sen. Long).

The central importance of evidence of the claimant's medical condition is further confirmed by the new "medical improvement" standards enacted by Congress in Section 2 of the 1984 Act (98 Stat. 1794) for assessing the continued eligibility of persons who already are receiving benefits. 42 U.S.C. (Supp. II) 423(f)(1), 1382c(a)(5)(A). See H.R. Rep. 98-618, 98th Cong., 2d Sess. 11-13 (1984); S. Rep. 98-466, *supra*, at 8-10.



> impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *.

See also 42 U.S.C. 1382c(a)(3)(B). In the court of appeals' view, the reference in this provision to the claimant's "age, education, and work experience" requires a particularized consideration of those three factors in *every* disability determination, and benefits therefore cannot be denied solely on the basis of the medical evidence regarding the severity of the claimant's impairment. See Pet. App. 5a, 9a.

The court of appeals erred in believing that the language of Section 423(d)(2)(A) compels a specific consideration of the claimant's age, education, and work experience in every disability determination, irrespective of the nature of the medical evidence of the claimant's alleged impairment.[12] On its face, Section 423(d)(2)(A) merely states further conditions of eligibility that the claimant must satisfy in order for his application for benefits to be *granted*: Not only must he satisfy the requirements of the basic definition of "disability" in 42 U.S.C. 423(d)(1)(A); in addition, he will be found to be under a disability "only if" he is unable to do his previous work and any other kind of substantial gainful work which exists in the national economy. Conversely, however, Section 423(d)(2)(A) does not by its terms impose any conditions that must be

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[12] The other courts of appeals that have invalidated the severity regulation likewise have relied primarily on the reference in 42 U.S.C. (Supp. II) 423(d)(2)(A) to the claimant's "age, education, and work experience." See *Wilson* v. *Secretary of Health & Human Services*, slip op. 9-13; *Johnson* v. *Heckler*, 769 F.2d at 1210-1211; *Hansen* v. *Heckler*, 783 F.2d at 174; *Brown* v. *Heckler*, 786 F.2d at 871-872 & n.4; cf. *Dixon* v. *Heckler*, 785 F.2d at 1104-1105. But see *Baeder* v. *Heckler*, 768 F.2d 547, 551-552 (3d Cir. 1985) (relying on 42 U.S.C. 423(d)(1)(A)).

satisfied in order for the claimant's application for benefits to be *denied,* at least where the Secretary has determined that the claimant has failed to satisfy the requirements of the basic definition of "disability" in Section 423(d)(1)(A) and implementing regulations. In this case, the Secretary has determined that respondent failed to satisfy the requirement in the regulations implementing Section 423(d)(1)(A) that her impairment must meet a threshold standard of severity. It therefore was unnecessary for the Secretary to proceed to the additional conditions of eligibility under Section 423(d)(2)(A), including an assessment of respondent's ability to perform her own past work and a specific consideration of respondent's age, education, and work experience for purposes of deciding whether she could perform any other substantial gainful work that exists in the national economy.[13]

Moreover, as SSR 85-28 makes clear, the severity regulation is fully consistent with 42 U.S.C. (Supp. II) 423(d)(2)(A) even if that provision were construed to limit the Secretary's power to deny an application where the claimant has failed to satisfy the eligibility requirements in Section 423(d)(1)(A) and implementing regulations. In SSR 85-28, the Secretary explained that an impairment is found to be "not severe" only when the medical evidence establishes that the impairment "would have no more than a minimal effect on [the] individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a). "Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be

[13] As we explain below (see pages 39-41, *infra*), this interpretation of Section 423(d)(2)(A) is confirmed by the legislative history of its enactment in 1967, which shows (i) that it was enacted because of congressional concern that the basic definition of "disability" in Section 423(d)(1)(A) had been given too broad a construction by the courts, and (ii) that Congress intended to reaffirm the primary importance of medical factors in the disability determination process.



not severe would not prevent him or her from engaging in SGA" (*ibid.*). As a result, the severity regulation operates to screen out those claimants who it may reasonably be presumed would be found not to be disabled if the sequential evaluation process were to proceed to a specific consideration at step 5 of their age, education, and work experience. See 43 Fed. Reg. 9296 (1978); *McDonald* v. *Secretary of Health & Human Services,* slip op. 11, 16-17; *Hampton* v. *Bowen,* 785 F.2d at 1311; *Farris* v. *Secretary of Health & Human Services,* 773 F.2d at 90; *Brady* v. *Heckler,* 724 F.2d 914, 920 (11th Cir. 1984) (quoting *Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations* (1980)).

4. The validity of the severity step of the disability determination process is in any event expressly confirmed by 42 U.S.C. (Supp. II) 423(d)(2)(C). That paragraph, which was added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984 (98 Stat. 1800), provides (emphasis added):

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient *medical severity* that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a *medically severe* combination of impairments, the combined effect of the impairments shall be considered throughout the disability determination process.[14]

The first sentence of this new paragraph clearly refers to the threshold determination of "medical severity" that is made at step 2 of the sequential evaluation process. And

[14] An identical provision applicable to the SSI program is contained in 42 U.S.C. (Supp. II) 1382c(a)(3)(G).

the second sentence just as clearly contemplates that the subsequent steps of the "disability determination process" (which include steps 4 and 5, at which the decision-maker would consider the claimant's ability to perform his past work and his age, education, and work experience) will be reached only "[i]f the Secretary *does* find a medically severe combination of impairments" (98 Stat. 1800 (emphasis added)). See *Johnson* v. *Heckler,* 776 F.2d at 170 (Easterbrook, J., dissenting from denial of rehearing en banc). In this case, because the Secretary found at step 2 that respondent did not have a medically severe impairment or impairments (Pet. App. 28a), it was unnecessary for the Secretary to proceed to the subsequent steps of the disability determination process.

5. In sum, the severity step of the sequential evaluation process is affirmatively supported by the text of the basic definition of the term "disability" in 42 U.S.C. 423(d)(1)(A) and by the other provisions of the Act that underscore the importance of medical evidence in the disability determination process. The regulation also is fully consistent with the further limitations on eligibility in 42 U.S.C. (Supp. II) 423(d)(2)(A), and it is expressly ratified by the new provision in 42 U.S.C. (Supp. II) 423(d)(2)(C) concerning the consideration of multiple impairments. The court of appeals' conclusion that the severity regulation conflicts with the text of the Act – which was reached in a two-sentence discussion of 42 U.S.C. (Supp. II) 423(d)(2)(A) alone (Pet. App. 9a) – therefore is completely without merit.[15]

[15] In addition to holding that the severity regulation conflicts with 42 U.S.C. (Supp. II) 423(d)(2)(A), the court of appeals also concluded that the regulation is inconsistent with various court of appeals decisions that it read to mandate that "disability determinations be made according to a two-step process, with the claimant first showing an inability to perform past relevant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work" (Pet. App. 10a-11a). This conclusion is without merit. Nothing in the Social Security Act suggests that the disability determination process must be



rigidly confined to just two such steps. To the contrary, under 42 U.S.C. 405(a), the Secretary has " 'exceptionally broad authority' " (*Heckler* v. *Campbell,* 461 U.S. at 466 (citation omitted)) to adopt rules "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases.

Nor does the Act mandate that a claimant may establish a "prima facie" case by showing that he is unable to do his past relevant work, thereby automatically shifting the burden to the Secretary to show that the claimant nevertheless can perform other work that exists in the national economy, as the court of appeals also seemed to believe (Pet. App. 10a, 11a). Indeed, as we show in this brief, the text and legislative history of the relevant provisions of the Social Security Act clearly establish that it is also part of the claimant's initial burden to show on the basis of medical evidence that he has an impairment that satisfies a threshold level of severity. Moreover, of the relevant provisions of the Social Security Act, it is only 42 U.S.C. (Supp. II) 423(d)(2)(A) that expressly refers to the claimant's inability to perform not only his own past work, but also any other substantially gainful work that exists in the national economy. Section 423(d)(2)(A) was enacted in 1967 to make explicit these further conditions of eligibility that must be satisfied before an application for benefits may be allowed. See pages 25-27, *supra.* Section 423(d)(2)(A) therefore does not excuse the claimant from satisfying any other eligibility requirements that are imposed by the basic definition of disability in Section 423(d)(1)(A) and implementing regulations, including the requirement that the claimant establish the existence of a severe impairment. Of course, if these other requirements are satisfied and the sequential evaluation proceeds to steps 4 and 5, the burden-shifting rule to which the court of appeals referred is applicable.

In any event, as the Secretary explained in SSR 85-28 with respect to the language of the current severity regulation (Pet. App. 43a):

> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work.

Moreover, SSR 85-28 states that under current procedures, if the "evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work," the claim will not be denied at step 2 and the decision-maker will undertake "further evaluation of the individual's ability to do other work considering age, education and work experience" (*ibid.*). Compare *McDonald* v. *Secretary of Health & Human Services,* slip op. 17-19 & nn.7-9.

## B. THE LEGISLATIVE HISTORY OF THE RELEVANT AMENDMENTS TO THE SOCIAL SECURITY ACT AND THE ADMINISTRATIVE HISTORY OF THE DISABILITY PROGRAM CONFIRM THE VALIDITY OF THE SEVERITY REGULATION

The validity of the severity step of the sequential evaluation process is further confirmed by the legislative history of the relevant amendments to the Social Security Act and the administrative history of the disability program since 1954. At virtually every turn, there is strong support for the regulation, and literally millions of claims have been tested against the threshold severity standard since the sequential evaluation process was formally adopted in 1978. It is far too late in the experience of the disability program for a court to hold that the severity regulation is beyond the Secretary's statutory authority. Yet there is no indication that the court of appeals gave any weight to these considerations in its almost casual invalidation of one of the most broadly applicable administrative measures on the books.

1. The basic statutory definition of the term "disability," which was enacted by Congress in 1954 and carried forward in 42 U.S.C. 423(d)(1)(A) in 1956 (see page 20 & note 10, *supra*), is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The Senate and House reports on the 1954 amendments both stress that this definition limits the program's protection to "[o]nly those individuals who are totally disabled by illness, injury, or other physical or mental impairment" (H.R. Rep. 1698, *supra*, at 23; S. Rep. 1987, *supra*, at 20. This emphasis on "total" disability obviously supports the Secretary's adoption of a mechanism for screening out those claimants whose impairments are relatively insignificant from a



medical perspective and who therefore are, at most, only partially disabled.[16]

Moreover, the Senate and House Reports on the 1954 amendments contain a detailed explanation of the statutory definition of "disability" that is directly relevant to the issue in this case:

> There are two aspects of disability evaluation: (1) *There must be a medically determinable impairment of serious proportions* which is expected to be of long-continued and indefinite duration or to result in death, and (2) there must be a present inability to en-

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[16] The purpose to limit protection to persons having a "total" disability was consistently stressed during the consideration of various disability proposals in the years prior to 1954. See, *e.g.*, *Report of the Committee on Economic Security*, H.R. Doc. 110, 76th Cong., 1st Sess. 8 (1939); *Annual Message of the President on Health Security*, H.R. Doc. 120, 76th Cong., 1st Sess. 16 (1939); Senate Comm. on Finance, *Recommendations for Social Security Legislation*, S. Doc. 208, 80th Cong., 2d Sess. 74-75 (1949) [hereinafter cited as S. Doc. 208].

In 1949, the House of Representatives passed a bill (H.R. 6000, 81st Cong., 1st Sess. § 107 (1949)) that provided for the payment of disability insurance benefits to "totally disabled" individuals. See H.R. Rep. 1300, 81st Cong., 1st Sess. 7, 27-30, 104, 107 (1949); 95 Cong. Rec. 13915-13916 (1949). However, the Senate rejected this provision, largely because of concerns about its potential cost. S. Rep. 1669, 81st Cong., 2d Sess. 4 (1950); 96 Cong. Rec. 8900-8904 (1950). As a compromise, Congress added a new Title XIV to the Act to provide grants to the states for assistance to the "permanently and totally disabled." Social Security Act Amendments of 1950, ch. 809, § 351, 64 Stat. 555 *et seq*. That program remained in effect until 1974 (see 42 U.S.C. (1970 ed.) 1351 *et seq*.), when it was replaced by the SSI program that had been enacted in 1972. See note 23, *infra; Atkins* v. *Rivera*, No. 85-632 (June 23, 1986), slip op. 2 n.2.

In 1952, Congress enacted the contingent disability "freeze" provision, which did not go into effect. See note 10, *supra*. The term "disability" was defined under that provision in a manner identical to that now contained in 42 U.S.C. 423(d)(1)(A). See § 3(d), 66 Stat. 771. Once again, the provision was viewed as furnishing protection only for the "totally disabled." H.R. Rep. 1944, 82d Cong., 2d Sess. 7 (1952); S. Rep. 1806, 82d Cong., 2d Sess. 2 (1952).

> gage in substantial gainful work *by reason of* such impairment * * *. The physical or mental impairment *must be of a nature and degree of severity* sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work. Standards for evaluating the severity of disabling conditions will be worked out in consultation with the State agencies.

H.R. Rep. 1698, *supra,* at 23 (emphasis added); S. Rep. 1987, *supra,* at 21 (emphasis added).

The first of the two "aspects" of the disability determination articulated by the congressional reports strongly supports the Secretary's adoption of an independent threshold requirement that the impairment be of "serious proportions" from a medical perspective alone. Only if that condition is met should it be necessary for the decision-maker to consider the second "aspect" of the disability determination: whether the claimant is unable to work by reason of "such impairment"—*i.e.,* by reason of an impairment found to be of "serious proportions."[17] The second sentence quoted from the committee reports likewise makes clear Congress's intent that the impairment must rise to a certain threshold level of severity before it

[17] The bill also provided that a person would be disabled if he satisfied a special statutory standard of blindness. See 42 U.S.C. 416(i)(1)(B). However, the reports state:

> A person who does not meet the statutory definition [of blindness], but who nevertheless has a *severe* visual impairment would be in the same position as all other disabled persons, that is, he may qualify for a period of disability under the general definition of disability if he is unable to engage in any substantially gainful activity by reason of his impairment.

H.R. Rep. 1698, *supra,* at 23 (emphasis added); S. Rep. 1987, *supra,* at 21 (emphasis added). The obvious implication is that if the claimant's visual impairment were not "severe" (and the claimant had no other severe impairment), it would be unnecessary for the Secretary even to consider whether the claimant could engage in substantial gainful activity.



may even be considered as the cause of the claimant's alleged inability to work. This principle affords some measure of assurance that the claimant's alleged inability to work is actually "by reason of" his impairment, as the Act requires, and not merely coincidental with the existence of a relatively minor ailment.[18] Finally, the third sentence in the passage supports the Secretary's decision to promulgate standards for "evaluating the severity" of impairments that, inter alia, require the claimant to make a threshold showing that his impairment significantly limits his ability to do basic work functions.[19]

[18] Representative Kean made the same point during the floor debates (100 Cong. Rec. 7445 (1954) (emphasis added)):

> There are two aspects to the disability evaluation: The physical or mental impairment must be (1) of a nature and *degree of severity to justify consideration of its alleged causal connection with failure to obtain any substantially gainful work,* and (2) it must actually result in loss of substantially gainful work * * *.

[19] It was anticipated from the inception of the disability program that the Secretary would promulgate regulations to implement the statutory standard of disability. See S. Doc. 208, at 74 ("The concept of permanent disability which the Council envisages should be defined in legislation only in broad terms and should be worked out in detail through regulations."); *id.* at 75 ("The exact limits of what constitutes 'substantial gainful activity' should, in the early years of the program, at least, be defined by regulations."); 96 Cong. Rec. 8903 (1950) (remarks of Sen. Douglas) (amendment to make mandatory the development of "medical guides"). See also House Comm. on Ways and Means, 93d Cong., 2d Sess., *Staff Report on the Disability Insurance Program* 6 (Comm. Print 1974) ("The orginal idea was that the broad language of the statutory definition would be amplified by regulations based on operational experience."); *id.* at 45-46, 50 (same); Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 2d Sess., *Administration of the Social Security Disability Insurance Program: Preliminary Report* 14, (Comm. Print 1960) [hereinafter cited as *Preliminary Report*] (same); S. Doc. 10, 77th Cong., 1st Sess. Pt. 3, at 53 (1941) (noting desirability of detailed regulations under the Social Security program); *Heckler* v. *Campbell,* 461 U.S. at 466 n.10.

2. The congressional intent that a finding of non-disability may be based on medical factors alone—where the claimant has failed to produce medical evidence that he has an impairment of serious proportions—was reflected in the *Disability Freeze State Manual,* which HEW issued on March 16, 1955, to guide the state agencies in making disability determinations under the 1954 Act. The *Manual* stated by way of introduction (*id.* § 304.B (emphasis added)):

> In the great majority of cases the State agency will be able to evaluate the applicant's impairment or combination of impairments on the basis that it meets or *does not meet the level of severity* presented in the listing of [presumptively disabling] impairments. [See §§ 321-323, 382-393.] Where a realistic evaluation cannot be made on the basis of the *medical factors* plus cessation of work, the State agency should consider non-medical factors described in the following sections. [See §§ 324-328, discussing age, education, and experience.]

This passage makes clear that, in appropriate circumstances, a person could be found not to be disabled on "medical factors" alone (if his impairment "does not meet the level of severity" in the listings) and that consideration of the "non-medical" factors of age, education, and experience would be required only if a "realistic evaluation" could not be made on the basis of medical factors alone. See also *id.* § 314.A ("The impairment must be sufficiently severe to be the cause of inability to work."); *id.* § 321.A. ("great emphasis should be placed on the nature and severity of the medical impairment").[20]

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Congress has now expressed in statutory form its intent that the disability program be administered according to such standards established by the Secretary. See 42 U.S.C. 421(a)(2), 42 U.S.C. (Supp. II) 421(j) and (k).

[20] The *Disability Freeze State Manual* was furnished to the Senate Committee on Finance in connection with its consideration of the disability benefits program that was enacted in the Social Security Amendments of 1956. See *Social Security Amendments of 1955: Hearings on H.R. 7225 Before the Senate Comm. on Finance,* 84th Cong., 2d Sess. 39 (1956). We have lodged a copy of the relevant provisions of the 1955 *Disability Freeze State Manual* with the Clerk of this Court.



This contemporaneous interpretation of the statutory standard of disability was subsequently incorporated into

In the Social Security Amendments of 1956, Congress incorporated verbatim into 42 U.S.C. 423(d)(1)(A) the definition of "disability" it had enacted two years earlier in 42 U.S.C. 416(i). See note 10, *supra.* The disability determination process was not discussed in detail in the legislative history of the Social Security Amendments of 1956, as it was in the committee reports on the 1954 amendments. The House Report did stress, however, that the bill provided for "a conservative program of disability insurance benefits" and that under the statutory eligibility standard, "an individual who is able to engage in any substantial gainful activity will not be entitled to disability-insurance benefits even though he is in fact severely disabled." H.R. Rep. 1899, 84th Cong., 1st Sess. 5 (1955). The latter passage suggests that the existence of a severe impairment was regarded as a necessary but not sufficient condition of eligibility.

Although the bill passed the House without debate (101 Cong. Rec. 10768-10772 (1955)), the Senate Finance Committee deleted the disability benefits provision. See S. Rep. 2133, 84th Cong., 2d Sess. 3-4 (1956). However, a disability benefits amendment was adopted on the Senate floor (102 Cong. Rec. 13037-13056 (1956)), retained in conference (H.R. Conf. Rep. 2936, 84th Cong., 2d Sess. 25-26 (1956)), and enacted into law. Senator George, the principal proponent of the amendment in the Senate, stressed that "the applicant for benefits must present sound and convincing medical evidence that he has a medically determinable impairment"; that the medical evidence "must indicate not only the nature of the impairment but also its severity"; and that the claimant "must prove his case" (102 Cong. Rec. 13038-13039, 15107 (1956)). The Members also repeatedly stressed during the floor debates that benefits would be available for the "totally disabled." See, *e.g.,* 102 Cong. Rec. 13037, 15107 (1956) (remarks of Sen. George); *id.* at 12884, 13044 (Sen. Lehman); *id.* at 13022 (Sen. Jackson); *id.* at 13024 (Sen. McNamara); *id.* at 14830 (Rep. Reed); *id.* at 14831 (Reps. Jenkins and Zablocki); *id.* at 14832 (Reps. Rodino and Henderson); *id.* at 14833 (Rep. Roosevelt).

the formal disability regulations promulgated by the Secretary in 1960. 25 Fed. Reg. 8100. This regulation provided in pertinent part (20 C.F.R. 404.1502(a) (1961) (emphasis added)):

> Whether or not an impairment in a particular case constitutes a disability * * * is determined from all the facts of that case. *Primary consideration is given to the severity of the individual's impairment.* Consideration is also given to such other factors as the individual's age, education, training and work experience. However, *medical considerations alone may justify a finding that the individual is not under a disability* where the only impairment is a slight neurosis, slight impairment of sight or hearing, or similar abnormality or combination of slight abnormalities.

This regulation, promulgated pursuant to the Secretary's broad authority under 42 U.S.C. 405(a), gave content to the statutory standard of disability based on the accumulated experience to that date in the administration of the disability program.[21] It therefore has particular signifi-

[21] The administrative interpretation of the statutory standard of disability was brought to Congress's attention prior to the promulgation of the regulations in 1960. During oversight hearings in 1959, Robert Ball, then-Deputy Director of the Bureau of Old-Age and Survivors Insurance, explained:

> The "by reason of any medically determinable physical or mental impairment" is really the heart of the definition. * * * [T]he distinction between this program and a kind of unemployment insurance or unemployment insurance for partially disabled people is that we have to be able to say that the medically determinable physical and mental impairment is itself *serious enough* so that the individual does not really have the capacity to engage in substantial gainful activity.

*Administration of Social Security Disability Insurance Program: Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 28 (1959) (emphasis added). See also *id.* at 29 (inability to engage in substantial gainful activity must be "primarily by reason of" a medically determinable impairment). Another representative of the Bureau testified regarding the medical "guides," which contained listings of presumptively disabling impairments similar to those now employed at step 3 of the sequential evaluation process (*id.* at 342 (emphasis added)):

> We believe these guides enable us to adjudicate quickly and uniformly those applicants who clearly meet the impairment characteristics as defined by the law. A claimant whose evidence shows that [his] impairment obviously is not the cause for not working can be easily excluded without using guides. These two techniques—allowing those who meet or parallel the level of the guides and excluding claimants with short duration and *minimal impairments*—limit more extensive development and evaluation to a smaller segment of claims.

This witness thus made clear that a full evaluation of a claim—including an assessment of the claimant's age, education and work experience—was not required where he had only a "minimal impairment."

In its March 1960 report to the full Committee on Ways and Means based on the oversight hearings in 1959, the Subcommittee discussed the Bureau's approach in terms that also support an independent severity requirement. See *Preliminary Report XVII* (emphasis added), quoting informal statement of Bureau offical (" 'such nonmedical factors as age, education, vocational skills, work experience, etc., must play a part in deciding whether a given individual with a *severe* mental or physical impairment can or cannot engage in substantial gainful activity' "); *id.* at 19 ("the individual's impairment must be the primary cause of the lack of capacity"); *id.* at 20 ("major medical impairments"). After the Subcommittee submitted its report (and after the Secretary promulgated the regulations discussed in the text), Congress passed the Social Security Amendments of 1960 (Pub. L. No. 86-778, 74 Stat. 924 *et seq.*), which included amendments to the disability program (Tit. IV, 74 Stat. 967-970). But although the House and Senate Reports on the 1960 amendments called attention to the extensive study of the disability program undertaken by the House Subcommittee (H.R. Rep. 1799, 86th Cong., 2d Sess. 12 (1960); S. Rep. 1856, 86th Cong., 2d Sess. 15 (1960)), Congress did not include any amendments to overturn the Secretary's implementation of the statutory standard of disability. This " 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the in-

cance here. Moreover, the regulation, which was revised slightly in 1965 (33 Fed. Reg. 11749), remained in effect in essentially identical form until 1978, when the sequential evaluation regulations were formally adopted. See pages 42-43, *infra*. Thus, the interpretation of the Act reflected in the current severity regulation—that a claim may be denied on the basis of medical evidence alone if the impairment is relatively minor—also has been a consistent and longstanding one, and it accordingly is entitled to particular deference by the courts. *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 10; *Pattern Makers* v. *NLRB*, No. 83-1894 (June 27, 1985), slip op. 19-20; *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844-845 (1984).[22]

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terpretation is the one intended by Congress.' " *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11 (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

[22] Regulations promulgated in 1957 likewise stated that "primary consideration is given to the severity of [the] impairment," but that "[c]onsideration is also given to such other factors as the individual's education, training and work experience." 22 Fed. Reg. 4362 (1957), adding 20 C.F.R. 404.1501(b) (1958). The 1957 regulations did not expressly state that a claim could be denied on the basis of medical evidence alone. However, 20 C.F.R. 404.1501(c) (1958), as added in 1957, did provide (22 Fed. Reg. 4362):

> It must be established by medical evidence, and where necessary by appropriate medical tests, that the applicant's impairment results in such a lack of ability to perform significant functions—such as moving about, handling objects, hearing or speaking, or, in the case of a mental impairment, reasoning or understanding—that he cannot, with his training, education and work experience, engage in any kind of substantial gainful activity.

This focus on the effect the impairment has on the claimant's ability to perform "significant functions" (and the examples of such functions) presaged the current severity regulation's reference to "basic work activities" and the accompanying examples of the abilities and aptitudes embraced by that term.



3. In 1967, Congress reexamined the operation of the disability program and added 42 U.S.C. 423(d)(2)(A) to the Act. § 158(b), 81 Stat. 868. The court of appeals interpreted Section 423(d)(2)(A) essentially as a liberalization of the disability requirements, under which the Secretary is barred from denying benefits based on medical evidence, without also considering the claimant's age, education, and work experience. Pet. App. 5a, 9a. There is no support for this proposition. To the contrary, the legislative history demonstrates that Congress intended in 1967 to establish more stringent standards of disability and to "reemphasize the predominant importance of medical factors in the disability determination." S. Rep. 744, 90th Cong., 1st Sess. 48 (1967). This background obviously does not support the court of appeals' view that the enactment of Section 423(d)(2)(A) was intended to *prohibit* a policy of denying benefits on the basis of medical evidence alone in appropriate circumstances.

Moreover, when the 1967 amendments were enacted, the regulations promulgated by the Secretary in 1960 to implement the basic statutory definition of "disability" were already in effect. Those regulations, quoted above, expressly provided that medical considerations alone would support a finding of no disability. 20 C.F.R. 404.1502(a) (1966). Yet Congress did not amend 42 U.S.C. 423(d)(1)(A) or otherwise disapprove the formal and settled administrative construction of the term "disability" reflected in those regulations. When Congress thoroughly reexamines a statutory program and revises it in certain respects, Congress is generally understood to have approved those aspects of the program that it left unaltered. See *CFTC* v. *Schor*, slip op. 11; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 11; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982).

That conclusion is particularly compelling here. As we have explained (see pages 25-26, *supra*), the new 42 U.S.C. 423(d)(2)(A), by its terms, simply made explicit certain *additional* conditions of eligibility: Not only must the claimant establish that he has a mental or physical impairment of "serious proportions" and of "a nature and degree of severity" sufficient to justify its consideration as the cause of his failure to obtain work, as the committee reports on the 1954 amendments explained (see H.R. Rep. 1698, *supra,* at 23; S. Rep. 1987, *supra,* at 21 (both quoted at pages 31-32, *supra*)); under Section 423(d)(2)(A), a claimant who meets that requirement also must demonstrate that his "impairment or impairments are of *such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. (Supp. II) 423(d)(2)(A) (emphasis added)). Nothing in this further prerequisite undermines the validity of the preexisting threshold requirement under Section 423(d)(1)(A) that the claimant's impairment be severe from a medical perspective.

The legislative history in fact confirms that Congress intended no such departure from settled practice. The House and Senate Reports both explained the method for determining disability that Congress contemplated:

> The bill would provide that such an individual would be disabled only if it is shown [i] *that he has a severe medically determinable physical or mental impairment or impairments;* [ii] that if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability; and [iii] that if, considering the severity of his impairment together with his age, education, and experience, he has the ability to engage in some other type of substantial gainful work that exists in the national economy even though he can no longer do his previous work, he also is not under a disability.



S. Rep. 744, *supra*, at 48-49 (emphasis added); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967) (emphasis added). This congressional description is a virtual blueprint for the sequential evaluation process that was formally adopted by the Secretary in 1978. The emphasized passage plainly supports the requirement at step 2 of the current process that a claimant make a threshold showing that his impairment is "severe" before it is necessary for the Secretary to determine at the next steps whether the claimant can do his past work and whether, in light of his age, education, and work experience, he can perform any other substantially gainful work that exists in the national economy.

Accordingly, when the Secretary in 1968 promulgated comprehensive disability regulations to take account of the 1967 amendments, he carried forward the preexisting authorization in 20 C.F.R. 404.1502(a) for benefits to be denied on medical evidence alone. 33 Fed. Reg. 11749, 11750 (1968). At the very least, the Secretary's retention of this regulation in 1968 reflected a reasonable construction of the 1967 amendments and their legislative history as not prohibiting the use of the regulation. The courts therefore are required to respect that construction. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 844-845.[23]

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[23] When Congress enacted the SSI program in 1972 (Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1471), it incorporated into 42 U.S.C. 1382c(a)(3)(A) and (B) the definition of the term "disability" from 42 U.S.C. 423(d)(1)(A) and the further conditions on eligibility in 42 U.S.C. 423(d)(2)(A), without expressing any disapproval of the longstanding implementation of the statutory standard of disability contained in the Secretary's regulations. See S. Rep. 92-1230, 92d Cong., 2d Sess. 384 (1972). When Congress incorporates statutory provisions from one program into another in this manner, it is presumed to be aware of the interpretation of those provisions and to intend that interpretation to be applied under the second program.

4. In 1978, the Secretary promulgated the first version of the regulations that formally established the sequential evaluation process for adjudicating disability claims. See 43 Fed. Reg. 55349; *Heckler* v. *Campbell,* 461 U.S. at 460. Those regulations required the decision-maker to determine at step 2 whether the claimant's impairment was "severe," and they explained that "[a] medically determinable impairment(s) is not severe [if it] does not significantly limit an individual's physical or mental capacity to perform basic work-related functions." 43 Fed. Reg. 55351 (1978), adding 20 C.F.R. 404.1503(c) (1979). The Secretary stressed that this definition was intended to be only a "clarification" of the prior regulation, which allowed a claim to be denied where the claimant's impairment was "slight" (43 Fed. Reg. 55353 (1978)); that "there is no intention to alter the levels of severity for a finding of * * * not disabled on the basis of medical considerations alone" (*ibid.*; see also *id.* at 9297); and that the regulation refers to impairments that "have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective of his or her age, education, and work experience" (*id.* at 9296).[24] The same severity concept was carried forward again in 1980,

*Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress's action in 1972 thus lends still further support to the validity of the severity regulation.

[24] In a study conducted in 1976, the Comptroller General had criticized as vague the reference in the then-existing regulations to "slight" impairments, and he recommended that the regulations be clarified, with appropriate examples, in order to promote uniformity of decision-making. *Report of the Comptroller General: The Social Security Administration Should Provide More Management and Leadership in Determining Who Is Eligible For Disability Benefits* 10-11 (1976). The 1978 revisions met those concerns by specifying that the severity of an impairment should be measured not in the abstract (*e.g.*, in terms of whether it is "slight"), but rather in terms of its impact on the ability of the claimant to perform basic work-related functions.



when the Secretary revised the disability regulations. See 45 Fed. Reg. 55574 (1980), adding 20 C.F.R. 404.1520 and 404.1521 (1981). The Secretary explained that the more detailed provisions were expected to result in "greater program efficiency" by limiting the number of cases in which it would be necessary to follow the full vocational evaluation procedures in 20 C.F.R. 404.1545 to 404.1568 and 416.945 to 416.968 (1981). See 45 Fed. Reg. 55574 (1980).

5. It was against this background that Congress thoroughly studied the Social Security disability program in the late 1970's and early 1980's and extensively revised certain of the governing statutory provisions. *Heckler* v. *Day*, 467 U.S. 104, 113-118 (1984). Although Congress was fully aware at that time of the sequential evaluation process, and specifically of the severity step in that process,[25] it did not include in the disability amendments of 1980 and 1982 any provision to reject the severity regulation. See Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.*; Act of Jan. 12, 1983, Pub. L. No. 97-455, §§ 2-7, 96 Stat. 2498-2502. This failure by Congress is itself " 'persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC* v. *Schor*, slip op. 11 (citation omitted). But in addition, the Senate Report on the 1980 amendments expressly reaffirmed that "[t]he 1967 amendments were intended to emphasize the role of medical facts in the determination of disability," and it quoted extensively from the Senate report on the 1967 amendments, which stated that a claimant must be shown to have " 'a severe medically determinable physical or

[25] See. *e.g. Disability Insurance Legislation: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 62-63, 82 (1979); Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Status of the Disability Insurance Program* 9-10, 18, 48 (Comm. Print 1981); Senate Comm. on Finance, 97th Cong., 2d Sess., *Staff Data and Materials Related to the Social Security Disability Insurance Program* 76-78, 110-112 (Comm. Print 1982).

mental impairment or combination of impairments.' " S. Rep. 96-408, 96th Cong., 1st Sess. 13 (1979), quoting S. Rep. 744, *supra*, at 48 (quoted at pages 40-41, *supra*).

The most significant recent development, however, is the enactment of the Social Security Disability Benefits Reform Act of 1984. As we shall show, Congress specifically considered the severity regulation when it passed the 1984 Act and mandated one change in the application of the regulation by requiring consideration of the combined effect of separate impairments; but Congress otherwise expressed its approval of the severity step as a reasonable screening mechanism. Indeed, as we have explained (pages 27-28, *supra*), Congress effectively ratified the severity step in the text of Section 4 of the 1984 Act (98 Stat. 1800). The new statutory provisions added by Section 4 (see 42 U.S.C. (Supp. II) 423(d)(2)(C), 1382c(a)(3)(G)) expressly contemplate that the claimant may be required to demonstrate that his impairments are of "sufficient medical severity" to warrant their consideration as the basis of eligibility, and that the subsequent steps of the "disability determination process" will be reached only if the Secretary first finds a "medically severe" impairment or combination of impairments.

The legislative history of Section 4 of the 1984 Act dispels any possible doubt about Congress's intent in 1984 to preserve the severity step of the sequential evaluation process. The Senate report, for example, states that under "[p]resent law," "[m]edical considerations alone can justify a finding of ineligibility where the impairment[ ] is not severe," and that "[a]n impairment is nonsevere if it does not significantly limit the individual's physical or mental capacity to perform basic work-related functions." S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984). The latter passage, of course, is a virtually verbatim paraphrasing of the severity regulation. The report then states (*ibid.* (emphasis added)):



> [T]he Committee wishes to emphasize that the new rule [requiring consideration of multiple impairments] is to be applied in accordance with the existing sequential evaluation process and is not to be interpreted as authorizing a departure from that process. As the Committee stated in its report on the 1967 amendments, an individual is to be considered eligible "only if it is shown that he has a severe medically determinable physical or mental impairment or impairments."[26] *The amendment requires the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe. If they are not, the claim must be disallowed.* Of course, if the Secretary does find a medically severe combination of impairments, the combined impact of the impairments would also be considered during the remaining stages of the sequential evaluation process.

The House Report likewise contains an extensive discussion of the sequential evaluation process (H.R. Rep. 98-618, 98th Cong., 2d Sess. 6-8 (1984)), which reflects the committee's understanding that if the claimant does not have a "severe impairment," the process "goes no further" (*id.* at 6). To be sure, as the court of appeals observed (Pet. App. 9a-10a), the House Report does express the committee's "concern[]" that the Social Security Administration had been criticized for applying "very strict criteria" of severity at step 2, without fully evaluating the individual's ability to work (H.R. Rep. 98-618, *supra*, at 7), and the Report notes that "[t]his criticism ha[d] been particularly strong in the case of multiple impairments" (*id.* at 6). But the Report at the same time makes clear the committee's view "that in the interests of reasonable administrative flexibility and efficiency, a determination that

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[26] Quoting S. Rep. 744, *supra*, at 48, quoted at page 40, *supra*.

a person is not disabled may be based on a judgment that the person has no impairment, or that the impairment or combination of impairments [is] slight enough to warrant a presumption that the person's ability to work is not seriously affected" (*id.* at 8). The Report recognizes that "[t]he 'current sequential evaluation' process allows such a determination," and states that "the committee does not wish to eliminate or seriously impair the use of that process" (*ibid.*).

Accordingly, the House, like the Senate, mandated a change in the severity step of the sequential evaluation process only to the extent of requiring consideration of the combined effect of multiple impairments. In all other respects, the House, again like the Senate, left the severity step intact and endorsed its continued use,[27] although the House committee noted that the Secretary planned to reevaluate the criteria for nonsevere impairments and "urge[d] that all due consideration be given to revising those criteria to reflect the real impact of impairments upon the ability to work" (H.R. Rep. 98-618, *supra*, at 8).

In light of the agreement of the House and Senate, it is not surprising that the Conference Committee likewise preserved and endorsed the use of the severity step, modifying it only to the extent of requiring consideration of the combined effect of multiple impairments. Thus, the Conference Report recognizes that "[u]nder current policies, if a determination is made that a claimant's impairment is not severe, the consideration of the claim ends at that

[27] Both the House and Senate did so despite criticism of the severity step during the hearings. See *Social Security Disability Insurance: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 197-205 (1983); *Social Security Disability Insurance Program: Hearings Before the Senate Comm. on Finance*, 98th Cong., 2d Sess. 234-237 (1984). Compare *Heckler* v. *Day*, 467 U:S. at 114 n.24.



point" (H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 30 (1984)). The Conference Report then continues (*ibid.* (emphasis added)).

> The conferees also believe that in the interests of reasonable administrative flexibility and efficiency, a determination that an individual is not disabled may be based on a judgment that an individual has no impairment, or that the *medical severity of his impairment or combination of impairments is slight enough to warrant a presumption, even without a full evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current "sequential evaluation process" allows such a determination and the conferees do not intend to either eliminate or impair the use of that process.* The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for nonsevere impairments and expect that the Secretary will report to the Committees the results of this evaluation.

Contrary to the court of appeals' view (Pet. App. 8a-9a), it is difficult to see how Congress in 1984 could more clearly have expressed its intent to permit continued use of the severity step based on medical evidence alone, and not to require the decision-maker at that step either to consider whether the claimant can perform his own past work or to take into account the claimant's age, education, and work experience.[28] The fact that Congress recognized

[28] This conclusion is confirmed by the remarks of Senator Long (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)):

> The conference agreement, with minor language changes of a technical nature, follows the Senate approach. This language clearly indicates that Congress envisions a sequential approach to evaluating disability. The individual must first demonstrate the existence of an impairment or combination of impairments which are sufficiently severe from a medical standpoint as to meet the Secretary's criteria as to what could potentially be a disabling

that the *Secretary* intended to reevaluate the criteria for determining what impairments are severe does not authorize a *court* to invalidate the regulation altogether, as the court below did in this case (Pet. App. 10a).[29]

Indeed, during the floor debate on the Conference Report, Senator Long, a ranking member of the Conference Committee, specifically observed that "[s]ome courts * * * have ruled that the Secretary cannot deny

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condition. If, and only if, the individual meets this test, there would be a further evaluation as to whether that condition or combination of conditions does in fact preclude him from engaging in substantial work activity in the light of his age, education and work experience.

No Senator or Representative expressed a contrary view. Compare *id.* at H9836 (remarks of Rep. Pickle, the House floor manager) (combined effect of impairments must be considered in determining whether the claimant's impairments are "medically severe enough" to qualify him for benefits).

[29] The Secretary has taken several steps in furtherance of the reevaluation to which the House and Conference Reports referred. First, in April 1985, the Secretary rescinded SSR 82-55 (1982), which had provided a list of illustrative examples of impairments generally considered to be non-severe. See SSR 85-III-II, at 47 (Apr. 1985). The court of appeals cited this ruling (Pet. App. 10a-11a n.8), but without noting that it had been rescinded. Second, in November 1985, the Secretary issued SSR 85-28, discussed at pages 10, 26-27, *supra*. SSR 85-28 emphasizes that a finding of "not severe" is made at step 2 when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a). This description of the manner in which the severity regulation is to be applied clearly comports with the House Report's urging that the criteria for identifying non-severe impairments "reflect the real impact of impairments upon the ability to work" (H.R. Rep. 98-618, *supra*, at 8). In addition, SSR 85-28 cautions adjudicators resolving disability claims at the administrative level that "[g]reat care" should be used in applying the non-severe concept (Pet. App 44a) and that denials at step 2 are appropriate only when the medical evidence clearly establishes that the impact of medical impairments is minimal or slight (*id.* at 42a).



claims solely on the basis that the individual has no severe medical condition but must always make an evaluation of vocational capacities" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)).[30] But Senator Long stressed that the Senate bill, after which the conference bill was patterned (see note 28, *supra*), had been "carefully drawn to reaffirm the authority of the Secretary to limit benefits to only those individuals with conditions which can be shown to be severe from a strictly medical standpoint—that is, without vocational evaluation" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)). The decision of the court of appeals cannot be reconciled with this considered judgment by Congress.

6. The Secretary promulgated revised versions of 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 in March 1985. In accordance with the text and legislative history of Section 4 of the 1984 Act, these new regulations take into account the combined effect of multiple impairments, but otherwise leave in place the step 2 requirement that the claimant demonstrate a medically severe impairment or combination of impairments that significantly limits his ability to perform basic work functions. 50 Fed. Reg. 8727-8728 (1985). The Secretary concluded in promulgating these regulations that Congress intended when it passed the 1984 Act to continue to permit the denial of a claim based solely on medical evidence that the claimant's impairment is not severe (see 50 Fed. Reg. 8726 (1985)). That manifestly is a permissible interpretation of Congress's action in 1984, and the severity regulation should have been sustained by the court of appeals on this ground alone. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 844-845. This conclusion is all the more compelled when Congress's most recent action is considered in light of the firmly established nature of the severity regulation in the administration of the disability program since 1954 and

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[30] That, of course, was a principal basis for the court of appeals' ruling in this case (Pet. App. 5a, 9a).

the consistent pattern of support for the regulation in the legislative history of prior amendments to the Social Security Act.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court for a determination of whether there is substantial evidence to support the Secretary's decision that respondent has not established the existence of a "severe" impairment within the meaning of 20 C.F.R. 404.1520(c) and 404.1521.

Respectfully submitted.

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# APPENDIX

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 223(d)(1)(A), (2)(A) and (C) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A), (2)(A) and (C), provides:

(d) "Disability" defined

(1) The term "disability" means–

(A) inability to engage in any substantial gainful acitivity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)–

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

* * * * *

(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

2. Section 1614(a)(3)(A), (B) and (G) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 1382c(a)(3)(A), (B) and (G), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.



For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

* * * * *

(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

* * * * *

3. 20 C.F.R. 404.1520 and 404.1521 provide:

**§ 404.1520 Evaluation of disability in general.**

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.



(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

**§ 404.1521 What we mean by an impairment(s) that is not severe.**

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activites.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

4. 20 C.F.R. 416.920 and 416.921 provide:

**§ 416.920 Evaluation of disability in general.**

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled.

We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work, If you cannot, we will find you disabled.



(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can on longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, Mar. 5, 1985]

**§ 416.921 What we mean by an impairment(s) that is not severe.**

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

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